

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

04-CR-402

YASSIN MUHIDDIN AREF
and MOHAMMED MOSHARREF HOSSAIN,

Defendants.

THOMAS J. McAVOY,
Senior United States District Judge

ORDER

On August 5, 2005, the Government made a motion for a protective order pursuant to the Classified Information Procedures Act ("CIPA") § 4 and Federal Rule of Criminal Procedure 16(d)(1). See doc. # 118. The motion was made *ex parte* and *in camera* as allowed by CIPA § 4 because it contained and/or involved classified information. See 18 U.S.C. App. 3 § 4. On August 8, 2005, the Court held an *ex parte, in camera* hearing with the Government regarding this CIPA § 4 motion. On August 9, 2005, the parties appeared in open Court during which the Court indicated, *inter alia*, that the Government had moved *ex parte* and *in camera* for a protective order under CIPA § 4. Immediately after the public proceeding, the Court held an *ex parte, in camera* hearing with defense counsel regarding the Government's CIPA § 4 motion in order to

obtain information that might aid the Court in resolving the CIPA § 4 motion. Also on August 9, 2005, the Government filed a redacted version of its CIPA § 4 motion. See doc. 119.

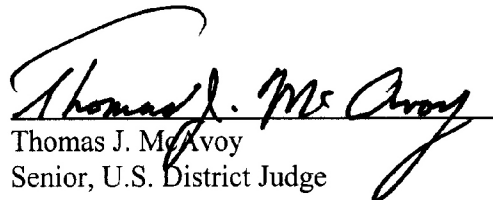
The Court Clerk's Office assigned the CIPA § 4 motion to the Court's September 12, 2005 motion calender. This assignment, in turn, gives the defendants until August 26, 2005 to file opposition to the motion. Defense counsel have filed letters indicating that due to the redacted nature of the Government's filing, they are unable to tell what relief the Government seeks and, therefore, are unable to respond to the motion. They seek a conference to obtain further elaboration on the Government's motion. See doc. 124.

The pending motion seeks a protective order preventing the disclosure of classified information that might otherwise be discoverable under federal law. Section 4 motions under CIPA are *ex parte* and *in camera* in nature. CIPA § 4; see 9 Fed. Proc., L. Ed. § 22:1124 (2004) ("Ex parte in camera proceedings under § 4 of the CIPA are appropriate where the defendants do not possess the classified information for which they are seeking disclosure. ... CIPA manifests a congressional intent to protect classified information from any disclosure incident to court proceedings at whatever stage, other than those disclosures provided for in the CIPA."). The Court's role on such motions is to insure that the defendants receive a fair trial while also insuring that information deemed vital to this Nation's security is not disclosed unless necessary. In fulfilling this role, the Court is "mindful of Congress' judgment,

expressed in CIPA, that the Executive's interest in protecting classified information does not overcome a defendant's right to present his case." United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004). While the redacted documents filed by the Government do not apprise the defendants of the information the Government asserts should be kept confidential, these documents do provide the defendants with much of the legal and factual basis that the motion is premised upon. The defendants may file opposition to the legal and factual propositions set forth in the Government's redacted Memorandum of Law if they deem such opposition appropriate. Further, should defense counsel wish to apprise the Court of defenses or defense strategies that the Court should "factor in" in making its CIPA Section 4 determination, Counsel may request a second *ex parte*, *in camera* hearing for this purpose. Beyond that, the application for a conference is **denied**.

IT IS SO ORDERED

DATED: August 15, 2005


Thomas J. McAvoy
Senior, U.S. District Judge